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IN THE

# SUPREME COURT

OF THE

# UNITED STATES

OCTOBER TERM, 1923

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation, *Petitioner,*

vs.

J. A. CZIZEK, *Respondent.*

## BRIEF OF RESPONDENT

*On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.*

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*Counsel for Respondent.*

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### STATEMENT OF FACTS

As respondent considers petitioner's statement of the case incomplete in many particulars, we are including a statement of facts.

The case was twice before the Circuit Court of Appeals (272 Fed. 223, 286 Fed. 478).

Respondent on and prior to November 30, 1917, was the owner of 50 shares of stock in the Idaho National Bank at Boise, Idaho. During the fall of 1917, David Miller, who was Vice-President of that bank, was engaged in purchasing its outstanding stock for the purpose of effecting a merger with the Pacific National Bank, at Boise.

Respondent discussed these matters with Miller, who suggested to him that he enter into this merger. Respondent told him he did not wish to enter into any merger but wished to sell his stock, that he had had some bad bank stock experience and did not wish to have the stock. They discussed the price of the stock pro and con. Miller told him he was going away and would be back at or near a certain time, and that they would have no difficulty about agreeing on the price, and that he, Miller, would buy respondent's stock (Tr. pp. 76-7). T. J. Jones, an attorney at Boise and a friend of respondent, owned 15 shares of the Idaho National Bank stock. Respondent then informed Jones about his talk with Miller, and that Miller would be back with money to buy their stock. Respondent, who was leaving shortly thereafter for his home at Oakland, California, requested Jones to act for him when Miller returned and that they would sell their stock together, as Miller wished to buy both their holdings together. Respondent before leaving for California again saw Miller and informed him that

Mr. Jones would represent him in relation to the sale (Tr. p. 77).

Miller returned to Boise to purchase the Jones' and respondent's stock in November, 1917. He had already purchased a large amount of stock in that bank for cash and had a large deposit in the bank. He called on Jones for that purpose and their talk (Tr. p. 60) resulted in Jones, at Miller's request, drafting the following telegram, in triplicate (Tr. p. 62):

> "Boise, Idaho, November 30, 1917.
>
> "J. A. CZIZEK,
> 5767 Shafter Avenue,
> Oakland, Calif.
>
> "Miller advises Idaho National sold to Pacific Offers me ninety dollars per share, otherwise wait year and chances of liquidation; says if fails to get two-thirds stock, liquidation will follow. Will you take ninety dollars per share for yours? I am inclined to accept offer for mine. Answer.
>
> "T. J. JONES."

Miller added to the typewritten draft of the telegram the word "answer", with a pen (Tr. p. 61). At the close of business on Friday, November 30, 1917, Miller's cash balance in the Idaho National Bank was $84,003.51. At the close of business on Saturday, December 1st, 1917, this balance was $33,943.11. His balance at the close of business on Monday, Decem-

ber 3d, 1917, was $30,826.50, and at the close of business on December 4th it was $30,818.41 (Tr. p. 97).

Jones on November 30, 1917, sent his son and law partner, Felix Jones, with the telegram to the office of petitioner in Boise. Felix Jones gave it to the operator at the desk and prepaid the charges thereon (Tr. pp. 89-90). Next day Miller inquired of Jones at his office if he had heard from respondent and was informed that he had not. Miller said he was very anxious to get the stock and said they should go ahead and close the deal and respondent's stock could be put in later, when Jones received it.

Felix Jones, at his father's direction, went to the telegraph office on the following day, Saturday, to inquire about an answer to the message. There was none and Jones asked the clerk to look through and see if a telegram had been sent to J. A. Czizek at Oakland (Tr. p. 90). She looked through some papers and said the telegram had been sent to Czizek. On Sunday, or Monday, he again inquired at the telegraph office, at which time they looked through some more files and the person behind the desk informed him that J. A. Czizek of Oakland had received the telegram (Tr. pp. 92-94).

T. J. Jones, not hearing from respondent, delivered his own stock to Miller and received in cash $90.00 per share therefor (Tr. p. 96).

The telegram was never transmitted from the Boise office. It was not even placed upon the operator's

hook for transmission. When respondent first learned of the message, about the middle of February, 1918, the manager of the Boise office found the telegram among some records and files of some prior day's business. No one at the time of the trial remembered how it came there or anything about the message, but the theory was advanced over respondent's objections, that it must have been misplaced when someone was examining the files of that prior day's business. This evidence was stricken out on respondent's motion, because it was only conjecture and surmise as to how the message came into the other files. It is true, as stated on page 8 of petitioner's brief, that the Trial Court in Findings XII and XIII on the second trial found that through the inadvertance of Margaret Brown the message was placed in a file of previous messages which had been sent, but, as found by the Court of Appeals, there was no evidence whatever upon which to base these findings. On page 113 of the transcript is found the testimony of the Manager, Mr. Hackett, that he had no knowledge of the message or of its failure of transmission until the middle of February, 1918, when respondent first learned of it and called it to his attention.

Mrs. Holland, formerly Margaret Brown, testified (Tr. p. 121), that she did not remember anything regarding the message nor the circumstances of its delivery to the Western Union office. Her conjecture as to how it might have gotten into the files of the other day's business was stricken out (Tr. p. 122).

There was, therefore, no evidence upon which to base anything in the XII and XIII findings except that Margaret Brown was a capable and efficient employee, which under the circumstances was wholly immaterial. See opinion of Court of Appeals on Second Appeal (Tr. pp. 122, 286 Fed. 481).

The message was an unrepeated message and was not valued. The bank afterwards, and before respondent had any knowledge of the attempt to send him the message, went into liquidation and the stock became and ever since has been worthless. Other facts and circumstances in the case were found by the Court of Appeals to bear out respondent's testimony that he would have immediately wired his acceptance and sent his stock to Jones to deliver to Miller.

Respondent's action was to recover $4500.00, the damage he suffered by reason of his inability to complete the arrangements for the sale of his 50 shares of stock to Miller caused by the failure of the telegraph company to transmit the message.

The printed blank upon which the message was written, *"to guard against mistakes or delays"*, contained the stipulations, rules and classifications of messages in force at that time, and which were filed with the Interstate Commerce Commission.

The material parts of these stipulations are:

> "1. The Company shall not be liable for *mistakes* or *delays* in the *transmission* or *delivery*, or

for *non-delivery* of any unrepeated telegram beyond the amount received for sending the same * * *"

"2. In any event the Company shall not be liable for damages for any *mistakes* or *delay* in the *transmission* or *delivery*, or for the *non-delivery* of this telegram, whether caused by negligence of its servants or otherwise, beyond the sum of fifty dollars, at which amount this telegram is hereby valued, unless a greater value is stated in writing thereon at the time the telegram is offered to the Company for transmission, and an additional sum paid * * *".

(Italics ours.)

On the first trial in the District Court, these stipulations were held to excuse the telegraph company for its total failure to transmit the message and for its representations to the sender that it had transmitted the message and that it had been received by respondent in Oakland.

The Court of Appeals reviewed and passed upon the various issues and upon this question held in substance that since the act of Congress of June 18, 1910 (36 Stat. 539), the interstate business of telegraph companies has been under Federal control and under the administrative control of the Interstate Commerce Commission, subject to a uniform national rule, and that there was no room for the exercise by the several

states of regulatory powers of penalizing the negligent failure to deliver promptly an unrepeated message and that the reasonableness of the regulations on the back of the telegraph blank are primarily for the Interstate Commerce Commission to determine.

No question was raised by Court or counsel as to the power and duty of the Commission to determine the classification of messages and establish reasonable rates and regulations.

The Court of Appeals held that they did not apply to the facts of this case for the reasons set forth in the opinion (Tr. p. 167); 272 Fed. 228, and remanded the case for a new trial.

The second trial was upon the same record, except for the attempt by the telegraph company to meet the charge of gross negligence and to explain its failure to transmit by advancing the *theory* that the message *must have been inadvertantly misplaced* in other files by some previous day's business where it was afterwards found, and by showing that the clerk who received the message at the desk was a careful and efficient employee, but as before pointed out there was no evidence whatever as to how the message was misplaced, or by whom, if any, of petitioner's employees, so that the facts upon both appeals were exactly the same, and constituted a total and unexplained failure to transmit or to attempt to transmit the message, coupled with representations by petitioner's employees that it had been sent and had been received by respondent in

Oakland. The evidence at the trial also showed conclusively that if the message in question had been marked and paid for as a repeated message, it would have been subjected to the same routine as an unrepeated message up to the time it was placed upon the operator's hook for transmission, and that the repeating directions are for the operator, who, in transmitting it, requests the operator at a relay point or at the receiving office to repeat it back for accuracy (Tr. pp. 110-111). There was no evidence to show that if the message in suit had been marked and paid for as a repeated message, or if it had been insured, it would have met a different fate, or have been transmitted over the Company's wires.

The District Court at the second trial followed the law of the case as set forth in the decision of the Court of Appeals and rendered judgment for the respondent for $4500.00 damages. The Company then took the case by writ of error to the Court of Appeals, and again made the same contentions that the stipulations on the telegraph blank excused the total failure to transmit. The Court of Appeals again recognized the rule that by reason of Congress having accorded to the Interstate Commerce Commission control of the regulation of rates to be charged by telegraph companies, they have authority to establish reasonable rates and also to classify messages, including authority to provide rates for unrepeated messages, and a corresponding reasonable limitation of liability where such lower rates are charged.

The Court further held that the identical question was urged on the former appeal and decided adversely to plaintiff in error, and that the decision in that case having become the law of the case, it was controlling upon the second appeal. (286 Fed. 478, Tr. Pp. 144-49)

Certiorari was granted by this Court to review the decision on the second appeal. No application for such a writ was made to review the first decision of the Court of Appeals, which was rendered April 4, 1921, and became final by the denial of the petition for rehearing on May 16, 1921, or nearly two years before the petition for the writ of certiorari was filed on April 5, 1923.

## ARGUMENT

The specifications of error and the cases cited will be discussed in the order in which they appear in the petitioner's brief.

## THE UNREPEATED MESSAGE CLAUSE

The rule announced by this Court in the cases cited that the interstate business of telegraph companies has been brought under Federal control and that the provisions of the Act of Congress placed them under the administrative control of the Interstate Commerce Commission and subjected them to a uniform national rule, was never questioned by respondent and was given full recognition by the Court of Appeals in this case.

It is admitted that the classification of messages into

unrepeated, repeated and valued messages is within the authority of the Interstate Commerce Commission and that the limitations of liability in cases of (1) mistakes, (2) delays, or (3) non-delivery to the amount of toll received for an unrepeated message as expressed in the telegraph blank are valid and binding, as far as applicable to the facts and unless they have been held unreasonable by the Commission itself.

Respondent's first contention involves the application of these regulations to the facts of this case, where there was a total failure to transmit or to attempt to transmit the message and where the petitioner's agents, after pretending to investigate and look through some files, informed the sender that the message had been sent and had been delivered to the respondent in Oakland.

Petitioner contends that this failure on its part is included in the expression "non-delivery".

Respondent's contention is that this expression does not and was never intended by the Commission to include *a total failure to transmit or to attempt to transmit* a message under the conditions disclosed here, and that the provision in question should not be construed beyond its just and reasonable meaning. That if such had been the purpose and intent of the petitioner and the Commission, the word "*non-transmission*" would have been added to the clause.

It is obvious that if petitioner had requested the approval of regulations which included the term "*non-*

*transmission*", it would not have been allowed by the Commission. It must be assumed that the answer would have been that petitioner could not go so far as to absolve itself from liability beyond the toll for the message, for failure to do the very thing for which it was created and which it held itself out to the public as ready and willing to do. While, from the nature of its business, there might be reasonable grounds for condoning, by limitation of liability, mistakes in verbiage, delays or non-delivery of a message, like reasons could not prevail in case of *a total failure to transmit*, accompanied by misrepresentations *that the message had been transmitted and delivered.*

Moreover, it will appear that the regulations in question as they appear upon the telegraph blank have since been held to be *unreasonable* by the Interstate Commerce Commission and the facts upon which such finding of unreasonableness was based have existed unchanged since the regulations were first promulgated, and that this finding is, under the uniformity and equality principle required by the Act to Regulate Commerce, to be interpreted as applying to the enforcement of the rule during the entire period.

The Unrepeated Message Case, *Cultra* vs. *Western Union Teleg. Co.*, 44 I. C. C. 670, cited and quoted from by petitioner in this Court and the lower Courts, is also reported in 61 I. C. C. 541, after further hearings in the interests of all patrons of telegraph companies who had been or were likely to be affected by the rule,

and not merely in the interests of those who were parties to the proceedings. Attention will hereafter be called to this case more in detail.

Respondent also contends that the rules limiting petitioner's liability as printed on the message in suit, having been held to be unreasonable by the Commission itself, they constitute no defense to the action, and that consequently rules which could have been subjected to still more liberal interpretation to include *non-transmission* would never have received the sanction of the Commission in the first place.

Respondent's further contention is that in this case gross negligence was alleged and proved, and that, as a matter of law, a carrier cannot contract against *willful misconduct* or *gross negligence*.

## EFFECT OF FILING THE REGULATIONS WITH THE INTERSTATE COMMERCE COMMISSION

At this point we will call attention to the principle that the power of the Courts to interpret the rules of a carrier is not affected by the Act to Regulate Commerce. Rules or regulations which may be enforced in a Court may still be construed by that Court. Under the Act it is the duty of the Commission in the first place, as part of its regulatory and administrative function, legislative in character, to establish, in the interest of uniformity, the tariff and regulations, but after this has been done, it is the duty of the Courts in the exercise of judicial functions to interpret these rules and regulations.

*Great Northern Railway Co.* vs. *Merchants' Elevator Co.*, 259 U. S. 285.

At page 290, this Court said:

> "Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff, it is one of federal law. If the parties properly preserve their rights. a construction given by any Court, whether it be Federal or State, may ultimately be reviewed by this Court either on writ of error or on writ of certiorari; and thereby uniformity in construction may be secured."

Again on page 291:

> "But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute."

It is equally true that the legality of a regulation or rate, apart from its reasonableness as a matter of fact, is a matter for determination by the Courts, and although a rule limiting the carrier's liability is filed with the Commission, it is within the power of the Court as a matter of law to decide that the rule is void as against public policy or because the liability cannot be so limited.

*Boston & Maine Railroad* vs. *Piper*, 246 U. S. 439, at

pages 444-45, is authority in the instant case, because there, as here, the particular clause in the bill of lading limiting liability from unusual delays caused by the carrier's negligence to the amount actually expended by the shipper, was held not within the principle of limiting liability on an agreed valuation which was the basis of a reduced rate, but in contravention of the principle that the carrier may not exonerate itself from losses negligently caused by it. It is therefore peculiarly within the province of the Court in this case to determine whether non-delivery caused by negligence and which is claimed to be the basis of a reduced rate for all classes of messages, includes *a total failure to transmit*, and if so whether or not this clause, so construed, would be valid. It would seem to follow that the subjecting of the entire field of interstate telegraphy to the administrative control of the Interstate Commerce Commission, which is urged by petitioner as a defense, cannot operate to deprive the Courts of the power to construe such provision or pass upon its validity, and thus secure uniformity of operation contemplated by the act.

We therefore respectfully urge that the placing of petitioner's business under the control of the Commission and the filing of its rules and regulations with the Commission, do not operate as a shield to prevent the Courts from passing upon the construction and validity of such rules, especially where it appears that the construction to include *non-transmission* has not

been approved by the Commission nor any classification established whereby, upon payment of a higher rate, the default involved and the resulting damage would be avoided. Moreover, we contend that if the Commission had approved a rule limiting the carrier's liability for *a total failure to transmit*, accompanied by false statements that there had been a transmission and delivery, in other words, a rule exempting the carrier from *gross* or *willful negligence* of whatever nature, the Courts would have the power and it would be their duty to declare such regulation void as against public policy, since such regulation would not be a proper or necessary one, based upon administrative or technical matters peculiarly within the province of the Commission, and would be outside the scope and purposes of the Act to Regulate Commerce, which contemplates the establishment of reasonable rules and regulations.

*In Norfolk Southern Railroad Company* vs. *Chatman*, 244 U. S. 276, the connecting carriers had filed with the Commission as part of their rates, a provision limiting their liability for personal injuries caused by their negligence, when sustained by a person traveling on a "drover's pass", with a shipment of livestock. The shipper was also required to sign this contract. In a suit for damages for injuries received by plaintiff while riding under such contract, this Court held that it had always declared such a limitation of liability void, and that filing such regulation with the Commis-

sion and publication thereof as required by the Act, would not make it valid.

It follows that the placing of the entire business of interstate telegraphy under the administrative control of the Commission by the Act to Regulate Commerce has not affected the power of the Court to determine (1) the proper interpretation of petitioner's rules and whether they apply to the facts of this case, and (2) whether such rules would be valid if construed to limit its liability for *a total failure to transmit* or *attempt to transmit* the message under circumstances which in this case amount to gross negligence.

The cases cited on page 17 of Petitioner's brief were not cases of *failure to transmit*. It is contended, however, that the *Dickerson* case was. An examination of the facts of that case in 74 So. 780-81, shows that the message delivered to the Postal Company at Tupelo, Mississippi, was to be sent to Gwin, Alabama. The blank of the Postal Company contained the stipulation which had been approved by the Interstate Commerce Commission, that the Postal Company "is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination." The Court further found that this stipulation was valid and binding and was part of the contract of transmission, and that the Postal Company

> "made diligent effort to send said message over its own line to Guin, Ala., but was unable to do so

by reason of the fact that the Guin office of the defendant company had then, at its regular time, closed for the day, and it therefore became necessary for the defendant company, in an earnest effort to get the message through to destination, to forward the same over the line of another company, which it did by delivering same to the Western Union Telegraph Company, paying the said company 25 cents for transmitting same, which was the same amount received by the defendant for sending the message."

The Western Union Company transmitted the message over its lines, but did not deliver it to plaintiff until about noon the following day. It was this failure of the Postal Company to transmit the message and the delay in delivery by the Western Union Company which was charged to be gross negligence. Obviously that case is clearly distinguishable from the case at bar.

We will not take the time to refer to the cases cited in petitioner's brief involving failure to deliver, because this condition is expressly provided for in the rules and does not, we contend, involve the same degree of negligence as a total and unexplained *failure to transmit* or to *attempt to transmit*. No case is cited in which this failure has been held to be excused by the provisions of the regulations which limit liability only for the following matters:

1. For a delay in transmission.

2. For a mistake or delay in delivery.
3. For the non-delivery of the message.

These regulations do not, therefore, include a *failure to transmit* or to *attempt to transmit*.

Limitations of liability contained in the regulations of a carrier are strictly construed by the Courts against the carrier and what is not plainly conditioned therein will not be included by implication.

In *Texas & Pacific Railway Company* vs. *Reiss*, 183 U. S. 621, the Court at page 626 says:

> "The bill of lading itself is an elaborate document, bearing on its face evidences of care and deliberation in the formation of the conditions of the liability of the companies issuing it. The language is chosen by the companies for the purpose, among others, of limiting and diminishing their common law liabilities, and if there be any doubt arising from the language used as to its proper meaning or construction, the words should be construed most strongly against the companies, because their officers or agents prepared the instrument, and as the Court is to interpret such language, it is, as stated by Mr. Justice Harlan, in delivering the opinion of the Court in National Bank vs. Insurance Company, 95 U. S. 673, 679: 'Both reasonable and just that its own words should be construed most strongly against itself.' To the same effect is London Assurance & C. vs.

> Companhia & C., 167 U. S. 149, 159, and Queen of the Pacific, 180 U. S. 49, 52."

The same rule was followed in *Royal Insurance Co.* vs. *Martin*, 192 U. S. 149, 162.

In the article entitled "Telegraphs and Telephones", 37 Cyc. 1686, by one of the distinguished counsel for petitioner in the present case, the rule is thus stated:

> "Even where such a stipulation has been held valid, except as against gross negligence or wilful misconduct, it will be strictly construed, and where it specifically mentions only certain grounds of liability, it will not be extended so as to include others not within the terms of the stipulation."

In note 10 are cited several cases holding that total failure to transmit is not within a stipulation against "mistakes or delays in the transmission or delivery or non-delivery", one of which is

> *Beatty Lumber Co.* vs. *Western Union Teleg. Co.*, 52 W. Va. 410, 44 S. E. 309.

In this case the Court referring to the clause, "To guard against mistakes or delays, the sender of a telegram should order it repeated", says: "This condition has no relevancy, except as to such failure or error as might be cured by repetition; it is only to errors preventable by repetition that such a condition logically applies."

The argument of petitioner is that non-delivery is the same as *non-transmission* because the result is the same. But it is the act of the carrier that is conditioned against, not the result of the act. Where the message has been transmitted but because of some mistake there has been no delivery, the Company has at least made some effort to carry out its duties. This limitation of liability for mistake or delay in delivery or non-delivery or mistake or delay in transmission pre-supposes that some effort has been made to transmit the message. None of these three things mentioned in the stipulation are the same as a *total failure to transmit* or to attempt to transmit a message, since a non-delivery cannot occur where no message was transmitted to deliver, nor can there be any delay in transmitting a message never transmitted at all. Under the rule of strict construction of such provisions, sanctioned by this Court, it is clear that the terms, "delay in transmission" or "non-delivery" cannot be extended to include a *total failure to transmit*.

Many of the cases denominate a total failure to transmit gross negligence, as a matter of law.

No case has been found where the regulations in question were held to excuse gross negligence, but on the contrary the rule has been recognized since the time that telegraph companies first attempted to limit their liability, that they could not do so in cases of gross or wilful negligence. This rule is as well settled

as the rule relating to a person traveling on a "drover's pass", announced in the famous Lockwood case.

The leading case in this country is

> *Primrose* vs. *Western Union Telegraph Company*, 154 U. S. 1.

That case involved a mistake in the verbiage of a cipher message, *not a failure to transmit*, and the Court held as to such mistakes that the Company could limit its liability.

Beginning on page 17, the Court approves *Birney* vs. *N. Y. & Wash. Teleg. Co.*, 18 Maryland 341, 358, saying:

> "the Court of Appeals of Maryland, while recognizing the validity of similar regulations, held that they did not apply to a case in which no effort was made by the telegraph company or its agents to put the message on its transit."

This Court in that case also approves *United States Teleg. Co.* vs. *Gildersleeve*, 29 Maryland, 232, and quotes, among other parts of the opinion, the following:

> "The appellant could not, by rules and regulations of its own making, protect itself against liability for its own wilful misconduct or gross negligence or any conduct inconsistent with good faith."

This Court also quotes from *Passmore* vs. *Western Union Teleg. Co.*, 78 Pa. St. 442, 455, where the same

distinction as to gross negligence is recognized, and other cases to the same effect, and this Court on page 27 said:

> "The conclusion is irresistible, that if there was negligence on the part of any of the defendant's servants, a jury would not have been warranted in finding that there was more than ordinary negligence."

This Court in the case of *Western Union Teleg. Co.* vs. *Estevc Brothers*, 256 U. S. 566, relied upon and frequently cited in petitioner's brief, interpreting the Primrose case, at page 569, said:

> "In Primrose vs. Western Union Telegraph Co., 154 U. S. 1, decided in 1894, this classification of rates and limitation upon the Company's liability were declared by this Court to be reasonable and valid, in the absence of *wilful misconduct* or *gross negligence*." (Italics ours.)

The case of *Bowman & Bull Co.* vs. *Postal Teleg. Co.*, 290 Ill. 155, 124 N. E. 851 (Dec. 1919), was one in which the Supreme Court of Illinois permitted a recovery on the ground that the telegraph company could not limit its liability by conditions on the telegraph blank, against the incorrect transmission of an interstate, unrepeated message. This doctrine standing by itself is contrary to the rule established by this Court.

However, the Supreme Court of Illinois also said, at page 858 of 124 N. E.:

> "Furthermore, we think the evidence here shows a degree of carelessness that amounts to gross negligence, and it is admitted that appellee would be liable for gross negligence."

The operator, in that case, had consciously garbled the message, making five changes in its verbiage, some of which he made because "he thought he was correcting the sender's poor grammar". The Court points out the fact that the operator took liberties in altering the message which he had no right to do, and said: "Such negligence cannot be excused."

In the absence of gross negligence in that case, the decision would clearly be contrary to the decisions of this Court.

On March 1, 1920, this Court denied a petition for a writ of certiorari in the Bowman case, 251 U. S. 562. The only conclusion that can be reached is that the writ was denied because of the presence of gross negligence.

In commenting on this case, counsel for petitioner say, on page 39 of their brief, that there was no valuation clause on the message blank, nor had any such regulation been filed with the Interstate Commerce Commission.

Counsel have inadvertantly overlooked the provisions on the back of the blank, set forth on pages 851-

852 of the Reporter, where the insured and valuation clause and the rates to be charged for such special valuation are set forth, and beginning on page 854, the Court discusses the effect of the Act of 1910 placing interstate telegraph companies within the administrative regulations of the Interstate Commerce Commission.

The case of *Western Union* vs. *Lange*, 248 Fed. 656 (C. C. A., 9th Cir.) was a case in which the Court upheld a recovery where gross negligence was shown. This Court, in 253 U. S. 101, 110, sets forth the three grounds upon which recovery was allowed:

> "(1) That the contract was an option terminable by the buyer's failure to make the payments required; (2) the oral agreement for the transmission of the message was a binding agreement upon the Western Union Telegraph Company; (3) that under the circumstances the Telegraph Company was guilty of gross negligence in failing to transmit and deliver the message."

This Court took the position upon the first point that the message in question was an agreement to sell and purchase and not an option, so that the plaintiffs were not damaged by the acts of the company. This was the only ground upon which the case was reversed.

Petitioner realizing, perhaps, the weakness of its position, in contending that the stipulations excused it from the effect of the gross and wilful negligence

shown here, attempted on the second trial to show that the message failed in transmission because of the inadvertence of a capable employee.

It wholly failed to do so because it was not shown that Margaret Brown, who received the message at the desk, had anything whatever to do with the failure to transmit or with placing it in other files of messages which had been sent on some previous day. The deductions of petitioner are based upon the incorrect premise that the inadvertence or negligence, if you will, of Margaret Brown at the receiving office caused the failure to transmit, and they argue, why should there be any greater liability than if the negligence of some employee at the terminal office caused a failure to deliver. They also argue that after the message is once delivered to and accepted by petitioner, it is in interstate commerce, and no rule of the common law as to gross negligence can thereafter apply to the service. Of course, it is only after the petitioner accepts the message that any relation whatever is created between the parties or any responsibility attaches. That argument, carried to its logical conclusion, means that after the message is accepted, the Courts are powerless to afford any remedy to an injured party, regardless of the nature of the act causing the injury, the theory being that the entire business of the petitioner, not part of it, is brought under Federal control, and to permit any common law liability to be enforced would destroy the uniformity contemplated by the

Act. The statement of the position shows its unsoundness. It is not in accord with the construction placed by this Court upon the Act to Regulate Commerce. Even where the Commission has approved a rule as applicable to a given state of facts, which we contend it has not done in case of *non-transmission*, the Court has power to construe such rule or to hold that it is void as against public policy. Where, however, no such rule has been approved, the parties are left to their common law liability to be settled by the Courts.

Many other well considered cases, which fully recognize the validity of the stipulations relating to mistakes or delays in transmission, or delivery and non-delivery, hold that a *total failure to transmit* is gross negligence as a matter of law.

> *Pierce Co.* vs. *Western Union Teleg. Co.* (S. C.) 177 N. Y. Supp. 598, citing on this point *Weld* vs. *Postal Teleg. Co.*, 210 N. Y. 59-77, 103 N. E., 957, and many other cases.

In *Birney* vs. *Printing Co.*, 18 Md. 341, 81 Am. Dec. 607, approved by this Court in the *Primrose* case, 154 U. S. 1, it was held that the exemption from liability for the non-transmission and non-delivery of unrepeated messages does not apply where no effort was made by the company to send the message. The Court said:

> "The terms of the notice in which exemption from liability is declared clearly imply an obligation on the part of the company to attempt the

> transmission and delivery of a message received by it for that purpose, and it would be most unreasonable to permit it to have the benefit of an exemption from liability without first bringing itself within the scope of the exemption provided for, by a full and faithful performance of its implied duties."

The same rule was followed in *United States Telegraph Co.* vs. *Wenger*, 55 Penn. St. 262, 93 Am. Dec. 751, where the Court held:

> "Telegraph company is guilty of gross negligence and is therefore liable to the sender of the message for such damages as he sustained in consequence thereof, where a prepaid message, sent from one place to another over the company's line, did not get beyond an intermediate point, and no reason was given by the company for its failure to transmit the message to its destination."

In *Wann* vs. *Western Union Telegraph Co.*, 37 Mo. 472, 90 Am. Dec. 395, the Court held:

> "Telegraph companies may specially limit their liabilities, but will not be protected from the consequence of gross negligence."

In the recent case of *Freschen* vs. *Western Union Teleg. Co.*, 189 N. Y. Supp. 649 (April, 1921), at page 654 the Court said:

"From all that appears here the defendant never sent the message received by it from its office. Its failure to deliver is not shown to be due to mistake in transcribing or difficulty in transmitting. All that appears is an absolute failure to perform its duty, unaccompanied by any explanation whatever of the cause of such failure. This, in my opinion, is gross negligence, for the consequences of which defendant is not relieved by the limited liability stipulations."

## THE FIFTY DOLLAR VALUATION CLAUSE

The same rule applies with equal force to the clause that in any event the company shall not be liable for any mistakes or delays in the transmission or delivery or for non-delivery of this telegram, whether caused by the negligence of its servants or otherwise beyond the sum of $50.00, at which amount the telegram is valued unless a greater valuation is stated in writing thereon and an additional sum paid equal to one-tenth of one per cent thereof.

The case of *Leedy* vs. *Western Union Teleg. Co.*, 130 Tenn. 547, 172 S. W. 278, involved gross negligence, and the $50.00 valuation clause was urged as a defense. The Circuit Court gave judgment for plaintiff, which was reversed in the Court of Civil Appeals, and the case was then taken to the Supreme Court of the State. After quoting the $50.00 valuation clause, the Court said:

"That Court (Civil Appeals) held this stipulation for limitation of liability valid and enforceable and the arguments of counsel of parties in this Court have for the most part been directed to the correctness of that ruling."

On page 279 of the Reporter the Court continues:

"Let it be assumed that the amendatory act of June 18, 1910, operated, notwithstanding the above considerations, to draw this matter to federal authority, exclusive of the states, and so far forth as to render the federal decisions alone applicable on the point of the validity of such a stipulation: Then, even in those jurisdictions where such provisions in telegraph contracts are upheld as valid limitations of liability, it is further held that public policy forbids that they be given operation to relieve the company from liability caused by the gross negligence of the telegraph company's agents and employees. Weld vs. Postal Telegraph Co., 199 N. Y. 88, 92 N. E. 415; Id., 210 N. Y. 59, 103 N. E. 957; Halsted vs. Postal Telegraph Co., 193 N. Y. 293, 85 N. E. 1078, 19 L. R. A. (N. S.) 1021, 127 Am. St. Rep. 952; Kiley vs. Western Union Telegraph Co., 109 N. Y. 231, 16 N. E. 75; Wheelock vs. Postal Telegraph Co., 197 Mass. 119, 83 N. E. 313, 14 Ann. Cas. 188; U. S. Telegraph Co. vs. Gildersleeve, 29 Md. 232, 96 Am. Dec. 519. And this is the rule in the Federal Courts. Postal

Telegraph Co. vs. Nichols, 159 Fed. 643, 89 C. C. A. 585, 16 L. R. A. (N. S.) 870, 14 Ann. Cas. 369, and federal cases therein cited.

"Gross negligence being found, as above shown, the defendant company cannot invoke the stipulation for its protection.

"If it could not do so in the Federal Courts, it would seem that there is no virtue left in its main contention before us."

The Oklahoma case cited on page 27 of petitioner's brief did not involve any question of gross negligence.

This is also true of the cases cited on page 28.

In the instant case, the finding of gross or wilful negligence, which practically amounted to fraud, or that entire want of care which would raise the presumption of a conscious indifference to consequences, is amply sustained by the testimony.

In addition to the total unexplained *failure to transmit* or to attempt to transmit the message, the importance of which appeared on its face, the petitioner's agents, after looking through some files, informed the sender that the message had been sent and on a subsequent occasion they again informed him, after looking through some more files, that it had been sent and delivered to respondent at Oakland, whereas such statements were absolutely false and a proper examination of its records must have disclosed that fact. The making of this false statement to the sender, who was acting as re-

spondent's agent in making the sale to Miller, misled him to such an extent that he considered it unnecessary to send respondent another message or attempt to further communicate with him, and he testified that in view of these statements he thought respondent might be on his way to Boise with his bank stock. (Tr. p. 64.)

The distinction between a valuation clause as found in express company regulations or the tariffs of carriers of freight and the valuation clause on the telegraph blank is obvious and certain. When a package containing a diamond ring, for example, is shipped, it has a definite value when shipment is made, and the shipper may value it at a sufficient amount to cover any loss in transit. This is true of any other commodity. It is a proper rule which estops a shipper who has declared a lower value and paid a lower rate from claiming greater damages.

A telegram, however, is not capable of being valued. The information to be conveyed thereby may be worth large sums at one minute and be valueless at another. It has no market value. Consequently no value can be declared. The theory is that the sender should declare as the value what his loss would amount to if an error or delay occurs in transmission, or delivery or non-delivery occurs, but how can he tell what loss will occur?

It is impossible for him to tell in advance what value to place on a telegram, which, in itself, has no value,

or the amount of the loss if an error is made, or if there is a total failure to transmit.

This valuation clause is not supported by the same reasons as apply to that in similar rules of carriers of goods. If a valuation cannot be made when the message is sent, an arbitrary valuation fixed by respondent should not be enforced after the loss occurs. The most that can be said of this clause is that it limits a recovery for ordinary negligence to $50.00, and no federal case has been found where such a clause has been held to limit recovery to $50.00 where there has been a *total failure to transmit*, under the circumstances disclosed here. In the opinion of the Court of Appeals (Tr. pp. 170-71) the principle governing this question is clearly, and, we think, correctly stated.

As before pointed out, the rule announced by this Court is that, even if these regulations attempted to include gross negligence, or wilful failure of duty in their phraseology, since public policy forbids such limitation, the courts have the power to declare such regulations void, although they had been approved by the Commission. It is not so much, then, a question, as far as gross negligence is concerned, of what is included in the language of the rule, as it is whether such limitations are lawful.

The Court of Appeals of New York in *Weld* vs. *Postal Telegraph Co.*, 199 N. Y. 88, 92 N. E. 415, at page 418, clearly shows the basis of this rule with respect to telegraph companies. The Court said:

"The liability of telegraph companies in respect of the business which they carry on is regulated by two things: 1. By contract. 2. By the nature of their quasi-public employment. In the absence of any special contract limiting or regulating their liability, they do not insure the safe and accurate transmission of messages, but they are bound to transmit them with a degree of care and diligence adequate to the business which they undertake. The liability which a telegraph company assumes under this general rule may, however, be limited by special contract, and that is today the universal practice. As it is a business requiring employes of peculiar skill, so it is also subject to atmospheric and physical disturbances which may set at naught the greatest care and skill. It is, therefore, but right that telegraph companies should have the power to limit their liability in cases where mistakes occur through no fault on their part, or for such mistakes of their employes as will occur through ordinary negligence, in spite of the most stringent regulations or the most vigilant general oversight. But manifestly this power cannot be extended further without placing the public absolutely at the mercy of those engaged in transmitting telegraphic messages. This is the *reason* of the rule, long since established in this state, that individuals and corporations engaged in this quasi-public business cannot contract to absolve them-

selves from liability for their own wilful misconduct or gross negligence. They may protect themselves by contractual limitations that are reasonable, but beyond that they may not go. That is the law as laid down by this Court in a number of cases."

The Court, after citing many of its decisions, continues:

"The cases cited all hold that a regulation limiting the liability of a telegraph company for a mistake in an 'unrepeated' message to the price paid for sending it is reasonable, but that it does not relieve such a company against the consequences of its gross negligence."

In *Lothian* vs. *Western Union Teleg. Co.*, 25 S. D. 319, 126 N. W. 621, at page 622, the Court said:

"Assuming its obligations as a common carrier may be limited by a special contract, defendant cannot be exonerated by any agreement made in anticipation thereof, from liability for the gross negligence, fraud or wilful wrong of itself or its servants." (Citing cases.)

The Court in this case defines gross negligence as "the want of slight care and diligence", citing 29 Cyc. 423.

This Court, defining it with reference to a gratuitous bailee, said:

> "But gross negligence is nothing more than a failure to bestow the care which the property in its situation demands."
>
> *Preston* vs. *Prather*, 137 U. S. 604, 608-9.

With reference to the negligence of a carrier, this Court, in *Milwaukee R. Co.* vs. *Arms*, 91 U. S. 489, pointed out the difficulty of defining "gross negligence" in all cases, but stated that, to visit the company with damages beyond the limit of compensation for the injury actually inflicted,

> "there must be some wilful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences."

In the instant case, although no exemplary damages are claimed, the acts of petitioner's agents in relation to this message can be considered in no other light than wilful and conscious indifference to consequences. The unexplained failure to transmit and the statements, after pretending to look through the files, that the message had been sent, and also that it had been sent and delivered to respondent at Oakland, can raise no other presumption than wilful and conscious indifference to consequences.

EFFECT OF THE DECISION OF THE INTERSTATE COMMERCE COMMISSION IN THE UNREPEATED MESSAGE CASE (Also known as the *Cultra Case* and the *Clay Produce Case*).

This case, which is also entitled *Clay County Produce Co.* vs. *Western Union Telegraph Company*, was finally decided May 3, 1921, 61 I. C. C. 541, *after* the decision of this Court in *Postal Telegraph & Cable Co.* vs. *Warren-Godwin Lumber Co.*, 251 U. S. 27, decided December 8, 1919, and after the decision in *Western Union Telegraph Co.* vs. *Boegli*, 251 U. S. 315, which was decided January 12, 1920.

The case of *Western Union Telegraph Co.* vs. *Estere Bros. Co.*, 256 U. S. 566, was argued on April 12th and 13th, 1921, before the *Cultra Case* was decided. The decision in the *Estere Case* was June 1, 1921. This Court cited the first report of the *Cultra Case* in the *Warren-Godwin* and *Estere Bros. Cases*, but the final decision in the *Cultra Case* was, of course, not before this Court in either of those cases.

The first report of the *Cultra Case* was also read by counsel for petitioner in the present case at the trials in the District Court and in the Circuit Court of Appeals and was used as authority on the legal questions involved. It is also cited and quoted from the Court of Appeals in its first opinion in this case. It is also cited as authority in several places in petitioner's brief in this Court.

We are therefore making further reference to that case as authority on the questions of law involved.

The facts in *Cultra* vs. *Western Union Teleg. Co.*, are shown in the *Unrepeated Message Case*, 44 Interstate Commerce Reports, 670. That report shows that on March 21, 1914, plaintiff sent a night letter which defendant transmitted incorrectly. The following is quoted from the report:

> "To recover damages for the loss so incurred the complainants brought their action against the defendant in the Circuit Court of Jackson county, in the State of Missouri. The defense there interposed by the telegraph company was (a) that the Court, by the terms of the contract under which the message was sent, was limited to an award of nominal damages only, even though the loss claimed was shown to have resulted from the defendant's negligence in forwarding the message; and (b) that the validity of the provisions in the contract restricting the defendant's liability to nominal damages was not within the competency of the State Court to deny, but was a Federal question which the Interstate Commerce Commission alone was authorized by law to consider and deal with. In the light of that contention, the Trial Court is holding the case in abeyance pending a ruling by this Commission. The questions presented for our consideration, as stated by the complainants, are in substance as follows: (a)

Whether the Congress, by the act of June 18, 1910, amending the act to regulate commerce, has vested in this Commission such jurisdiction over the rates and practices of telegraph companies as to bring under our control and within our regulating power the rules of such companies concerning their liability for damages incurred by reason of error or delay in the transmission or delivery of interstate messages; and (b) whether, if the Commission has such jurisdiction, *the present rules* of the defendant telegraph company, with respect to these matters, are *reasonable*, and, as the complainants put the inquiry, whether they are *consistent with a sound public policy*." (Our italics.)

The first question was decided in the affirmative, but the second question was only partially decided in that opinion, and this matter was held open for further investigation, as is shown by the subsequent report of the same case in 61 I. C. C. Reports, 541, where the Commission on page 544, said:

"The Unrepeated Message Case was decided May 17, 1917. By it common carriers engaged in the transmission of messages were apprised as to what, in our opinion, their practices should be in the settlement of damage claims arising through defaults in service. In order that we might be informed whether the general practice of the Western Union, defendant in the Unrepeated Message

Case, was in conformity with its published rules and *also to obtain further information relative to the reasonableness of the rules*, that proceeding was set down for further hearing. Further hearing was had on February 20, 1918. On August 1, 1918, the President, under powers conferred upon him by Congress, assumed possession and control of the defendant company and appointed the Postmaster General his agent to continue its operation. Control of the property remained in the hands of the government until August 1, 1919, and consideration of the evidence taken at the hearing of February 20, 1918, was held in abeyance during that period. Thereafter, on March 1, 1920, a further hearing was had for the purpose of ascertaining whether changes had been made in the practices of the company since the date of the former hearing, and also to afford an opportunity to parties interested to present to us any new facts bearing on *the propriety* of the rules. At this later hearing petitions in intervention were filed on behalf of various stock, cotton, and grain exchanges and other associations. In the interest of uniformity the general investigation was subsequently instituted."

In this decision, which was handed down on May 3, 1921, the Commission finally disposed of the matter left undetermined in the first report of the case.

The practices of petitioner, which tended to discredit the rules and classifications themselves, together with defects inherent therein, were pointed out on page 547, where the Commission said:

> "In considering the reasonableness of the rule limiting liability in the case of an unrepeated message to the amount of the toll received for sending it, the *evidential effect* of the voluntary practices of the Western Union, which handles 75 per cent or more of the telegraph business of the country, cannot well be overlooked. Prior to 1910 that rule was never observed, and all claims for damages were referred to and dealt with by the legal department without reference to its limited liability. Following the amendment of 1910 the conclusion was reached that thereafter there could be no latitude in the adjustment of claims, but that settlement would necessarily be made on a standard basis under fixed rules determined by the laws of the different states or the Federal laws. Under date of May 8, 1911, authority was granted the general superintendents to settle all claims up to $500 when damage resulted from a fault in service and there was no valid contract limiting the company's liability. The superintendents were instructed to disregard the unrepeated message condition, except in the case of claims arising or based on messages handled solely in New York, Massachusetts, California, or Rhode Island, where

the validity of the stipulation was upheld except in the event of gross negligence. In 1913 the policy was altered and claims were thereafter settled according to the discretion of the superintendents or managers. Since then adherence to the contractual limitations has not been required."

On page 548:

"A repeated telegram differs from the ordinary telegram in that it is repeated back at each stage of transmission from point of origin to destination. This class of message is seldom used, an operator testifying that in 17 or 18 years' experience he had transmitted perhaps 200 such messages. Repetition of a message is a certain guard against errors in transmission, but is no protection against delayed delivery. To many patrons of the telegraph service a delay may have as serious consequences as a mistake in transmission, particularly in the case of commercial telegrams between members of boards of trade and exchanges."

On page 549:

"The valued message appears to be of no practical use in the great majority of instances, because of the impossibility of anticipating what default, if any, there may be in the service and thus determining in advance what loss may ensue. So far as a large proportion of the public is con-

cerned this class of messages might be eliminated, as it never has been and probably never will be used to any considerable extent. If a valued message should be sent it would be handled in precisely the same manner as a repeated message; that is, repeated back at each stage of transmission, with extra care exercised in delivery. This class of message, however, is of importance to the carriers in that it places a limit upon unforeseen and unanticipated losses; and the contention pressed upon our notice, that senders can not well anticipate the results of defaults in the service, is at least no less true of the telegraph companies.

"The present record amply demonstrates the need for a substantial revision of respondents' rules concerning their liability on interstate messages. *All other common carriers* subject to the act have been made *fully liable* for their *errors or negligence*, notwithstanding attempted limitations by contracts, rules, or otherwise, except in instances where they have been expressly authorized by this Commission to maintain varying rates dependent upon the declared or agreed value of the article transported; and the record herein offers no sound reason why telegraph companies should longer be permitted to avoid liability for their errors or negligence or to limit it to the nominal amounts now provided for in their rules. It has been shown that these rules are not observed

by the Western Union, but that, on the contrary, meritorious claims arising in connection with unrepeated messages are adjusted either to the full extent of the loss suffered or on a basis satisfactory to the claimant."

The conclusion on this question is stated at page 550:

"Upon consideration of the record we find that the present rules of the respondents restricting their liability for negligence in the transmission or delivery, or for non-delivery, of *unrepeated* and *repeated* interstate messages *are* and for the future will be *unreasonable*."

At the time the message in the present case was accepted by the petitioner on November 30, 1917, the latter was a defendant in the case above referred to and at the time this action was commenced on June 13, 1919, the Commission had under investigation and advisement the reasonableness of the regulations in question here, and eventually on May 3, 1921, decided those rates to be unreasonable.

It appears, therefore, that at the time the message was delivered to petitioner on November 30, 1917, the question of the reasonableness of the regulations was before the Commission. Its decision of that question was judicial in its nature, and hence was effective on the date the message in suit was tendered for transmission, in exactly the same manner as if made by a Court.

This decision of the Commission is pointed out for two purposes:

First, it seems to us that it is persuasive authority as a matter of law as to the unreasonableness of the regulations in question, especially in the event they are construed to embrace the *total failure to transmit* or to include gross or wilful negligence, and that consequently they are no defense; and second, under the reparation principle established by this Court, this ruling of the Commission as to the unreasonableness of the regulation as set forth in the last paragraph quoted, although expressed in the present sense, has a retroactive effect, where it appears that this finding of the Commission is not based upon any temporary or changeable condition existing at the time, but upon what inhered in the rule, and therefore was true at the time of its adoption, and at the time the message in suit was delivered to petitioner. That it operates to discredit the rule as respects earlier transactions.

The case of *Pennsylvania R. R.* vs. *Stineman Coal Company*, 242 U. S. 299, is, we submit, directly in point and very similar as to the facts, and is authority on this point.

It is clear from an examination of the report of the Commission that it is within the principle of the Stineman case because the operation of the rules in question were under investigation since the passage of the act of 1910 placing telegraph companies under Federal control, and the Commission based its finding of unreason-

ableness solely upon the practices of the petitioner here, and the defects inherent in the rules themselves.

The exact language of the order is not quoted in the *Stineman Case*, but it is found in *Penn. R. Co.* vs. *Interstate Commerce Commission*, 193 Fed. 81, at page 82, which was a suit before the Commerce Court to enjoin its enforcement. It reads in the present tense: "It is ordered that said rule * * * unduly discriminates * * * and is in violation of the third section * * *."

> "It is further ordered that the defendant be, and is hereby notified and required on or before the 1st day of October, 1910, to cease and desist from said practice and to abstain from maintaining and enforcing its present rules and regulations * * *."

In construing the finding of the Commission, this Court, after referring to the granting of reparations, on page 302 said:

> "Not only so, but the Commission's report makes it plain that the finding was not based upon any temporary or changeable condition existing at the time but upon what inhered in the rule and therefore was true from the time of its adoption. The legal propriety of the Commission's finding is not questioned, but only that it operates to discredit the carrier's rule as respects earlier transactions.

> "In the circumstances stated we are of opinion that effect must be given to the Commission's finding, even though it came after the transactions in question, and that a recovery by the coal company cannot be permitted without departing from the uniformity and equality of treatment which the act is intended to secure."

This case, we submit, is authority on the point that the decision of the Commission as to the unreasonableness of the rules in question applies to such rules from the inception of the investigation, which was prior to the time the message in question was delivered to the petitioner.

The rule was also announced in the earlier case of *Phillips* vs. *Grand Trunk Ry.*, 236 U. S. 662, at page 665, where the Court held that the proceeding before the Commission was not in the nature of private litigation between the parties, but a matter of public concern in which the whole body of shippers were interested and that the findings inured to the benefit of every person who had been obliged to pay the unjust rate. Otherwise, the immediate parties to the litigation would secure an advantage over the general body of the public.

The plaintiffs in the *Cultra Case* in the State Court of Mississippi, which was being held in abeyance pending the decision by the Commission above cited, were undoubtedly permitted to recover in that case, since the rules set up in defense were declared unreasonable, and

it would seem that in the interest of the uniformity and equality of treatment which the Act to Regulate Commerce is intended to secure, respondent cannot be denied a like recovery.

## THE SIXTY-DAY CLAUSE FOR PRESENTING CLAIMS

On this question respondent respectfully presents the following points for consideration:

1. The provision in question will not relieve the Company from liability for its wilful and gross negligence.

2. There is no provision in the rules of the Company requiring the presentation of a claim for damages in writing within any specified time after the party injured first learns of the Company's default. Consequently the only requirement in such case is that the claim be presented within a reasonable time thereafter within the rules of the Common Law. This was done in this case.

3. The time and manner in which respondent presented the claim were expressly sanctioned by the Company, and the latter waived its presentation otherwise. The Company had full notice and knowledge of the damages claimed immediately after respondent first learned of it and proceeded to investigate the merits of the claim and promised in writing to communicate with respondent at the conclusion of its investigation, and the claim in writing of June 18, 1918, was sent to

the Company at the request of its manager, as respondent had waited a reasonable time without hearing further from the Company.

The Trial Court held that, as applied to the facts of this case, the requirement that demand in writing must be presented within sixty days from the filing of the message, if construed literally, would have to be held unreasonable for the parties concerned were wholly ignorant of defendant's failure to send or deliver the message until after the expiration of that time (Tr. p. 156).

The message was delivered to the Company November 30, 1917, but respondent had no knowledge whatever of such a message until his return to Boise from California about February 14, 1918.

He and Mr. Jones, the sender, at once called on Mr. Hackett, the General Manager of petitioner's office at Boise. Mr. Hackett informed them that he would look it up, and later handed the respondent the telegram. On February 14, 1918, Mr. Hackett sent a letter to Mr. Jones, which is set forth on page 68 of the transcript, in which he acknowledged that the message failed in transmission and he enclosed a check for the amount of the tolls paid on the message. Mr. Jones replied to this letter on February 18th, returning the check on the ground that an acceptance on his part *might be construed as a settlement of the matter.* (Tr. p. 69.)

After the receipt of this letter Mr. Hackett called

on Mr. Jones at the latter's office and said, "Mr. Jones, I came up to talk to you about the Czizek telegram that failed in transmission, and I would like to ask you some questions." He said further, "It is unfortunate that it didn't go through, and the Company will settle it." "There is no question about their liability." (Tr. p. 70.) He also said, "The amount that Czizek would be entitled to would be the difference between the value of the stock and the amount Miller offered, isn't that correct?" to which Mr. Jones answered, "Yes." He asked Jones what the stock was worth and Jones referred him to Mr. Streeter, the Cashier. Mr. Hackett said further, "I would like for you (meaning Jones) to fix the value, as I think you would be fair. *I have taken this matter up with the Company.*" (Tr. p. 73.)

Respondent at that time received a communication from some official or attorney for the Company from Salt Lake (Tr. p. 81). Afterwards, *at the request of Mr. Hackett*, respondent addressed a communication to the defendant Company and Mr. Hackett, the manager, in which he set forth as well as he could the facts in the case, and the latter sent it on to Salt Lake. This was dated June 18th, 1918, and is set forth at page 83 of the transcript. Respondent received a reply from Mr. Hackett acknowledging its receipt and stating that he had forwarded the same to the Company for consideration and making inquiry as to the value of the stock at that time, or at the time when respondent first discovered the message had not been sent, about

the middle of February when he returned to Boise. (Tr. p. 87.)

Under date of July 2nd, 1918, respondent received a letter from U. G. Life, District Commercial Superintendent of the Company at Salt Lake. This letter acknowledged receipt of the claim and advised that this matter had been taken under *immediate investigation*, upon the conclusion of which *respondent would be communicated with further*. It concludes with this paragraph:

> "However, more than sixty days have elapsed since date claim message was filed, our investigation will be conducted without prejudice to the situation created by your failure to bring matter to our attention at an earlier date." (Tr. p. 86.)

Respondent, after waiting a reasonable time and hearing nothing from the Company, commenced this action.

It is obvious that the sixty-day clause was not framed in contemplation of a situation in which the party injured could have no knowledge of the default for a period of more than sixty days after the telegram is filed with the Company for transmission. It amounts in this respect simply to lack of foresight on the part of the Company. Ordinary bills of lading of carriers usually contain the further provision that the claim must be filed within a certain time after shipper first learns of the loss or damage. It certainly is not a rea-

sonable contention that this provision should be construed to include a condition of facts not embraced within its terms.

We think the rule which applies, in the absence of any provision covering the facts in this case, is that the matter should be brought to the attention of the Company within a reasonable time after the person injured first learns of the default. It is reasonable and proper that this should be done to facilitate prompt investigation. When, however, the matter has been taken up by the officials for investigation, it is not incumbent upon the injured party to take any further steps until the Company refuses to settle the claim. This is especially true where, as in this case, the official of the Company promised to communicate with the respondent upon the conclusion of the investigation.

Considerable stress was laid upon the concluding paragraph of Mr. Life's letter, quoted above. Mr. Life interpreted the clause, as does counsel for petitioner, to mean nothing more than that the claim must be filed within the sixty days *from date message was filed*, which was impossible in this case. His statement that the investigation would be conducted without prejudice to the situation created by plaintiff's failure to bring the matter to their attention at an earlier date may be reasonably construed in view of the situation at that time, to mean that he would investigate the matter regardless of the sixty-day clause, and at the conclusion of the investigation communicate further with the

respondent. If he intended to ultimately urge this defense, what was the need of investigating at all? Fairness and good faith would seem to require of him that he either investigate the matter, and if he found the Company at fault, recommend a settlement, or notify respondent at once that he considered the claim barred by the sixty-day clause so that respondent could take such further action as he might desire.

It is a significant fact that he did not take the position now taken by petitioner that under the Interstate Commerce Act, the company could not waive this provision, and that consequently liability must be denied, but he took the position that the claim would be investigated on its merits and respondent communicated with further.

The statement in the letter with reference to the failure of respondent to bring the matter to their attention at an earlier date is untrue and self-serving, as the evidence conclusively shows that it was brought to their attention as soon as plaintiff learned of it and it had been under investigation since that time.

If Mr. Life intended in his letter to convey the meaning claimed for it, he should have made his meaning clear by a simple statement that their investigation would be conducted without waiving their right under that clause of the message blank.

It will be observed that while the business of telegraph companies has been brought within certain provisions of the Interstate Commerce Act, this case is

not governed by the provisions of this Act which relate to the liability of passengers and freight and providing the time within which claims for damages or misdelivery must be presented and suit thereon commenced, known as the Carmack Amendment, 24 Stat. L. 379, as amended by the Act of June 29, 1906, 34 Stat. 593, and the decisions of this Court under that portion of the Act cited by petitioner have no application to this case.

The case of *Georgia, Etc. Railway Company* vs. *Blish Milling Company*, 241 U. S. 190, cited by petitioner, is authority for respondent on the general question of the construction of a provision requiring notice. The Court, at page 198, gives a very liberal construction to such requirements, stating that the objects of such a stipulation are to secure reasonable notice and apprise the carrier of the character of the claim, and that no formal notice in writing is required but that a telegram may be sufficient for that purpose.

In this case the letter of Jones returning the check for the toll sufficiently apprised the manager that a claim would be made and pursuant to that letter the manager discussed the matter with Jones and asked him if the measure of damages would not be the difference between the amount which Miller would have paid for the stock, or ninety dollars per share, and the value of the stock at that time, if it had any value, to which Jones replied in the affirmative.

The finding was that the bank having gone into

liquidation, the stock was valueless. It is plain that no prejudice resulted to petitioner by reason of the fact that no formal claim was presented at an earlier date, since petitioner was sufficiently advised of all of the facts.

Under the rules of the common law, there was a clear waiver on the part of petitioner of any further notice than the ones received by it.

The case of *Wheelock* vs. *Postal Cable Company*, 196 Mass 119, 83 N. E. 313, 314-15, is very similar to this case as to the facts relating to waiver. The provisions of the telegraph blank were the same as those in this case. The telegram was never received by the addressee and the plaintiffs had no knowledge of this fact until about six weeks after it was delivered to the Company for transmission and did not file their claim within sixty days from the date the telegram was filed by the Company. When the plaintiffs learned that the telegram had not been delivered, the matter was taken up with the local manager of the defendant's office. Similar negotiations took place as to those in this case. Investigation was promised with the statement that they would communicate further with the plaintiffs. No further communication was received from the Company for over three months after the telegram had been filed for transmission. Plaintiffs then sent defendant a written claim for damages.

The Court first considered the stipulation requiring the claim to be presented in writing within sixty days

after the filing of the message, and held that such a stipulation is a reasonable provision for the protection of the Company against stale claims and for securing an opportunity to investigate the same before the facts pass out of the memory of those who ouguht to know them.

The Court held, however, that this requirement could be and was waived by the defendant. The Court said:

> "There was a series of communications between the parties touching the subject, in all of which, fro[illegible]rst to last, the defendant discussed the question of liability on its merits, and professed in the beginning to intend to deal with it, and finally to have dealt with it, in reference to rights created by other parts of the contract, apart from any question as to the formal presentation of a claim in writing. The defendant's conduct in regard to it was such as naturally to throw the plaintiff's off their guard, and it appears that they did not read this stipulation nor consult counsel about their claim until after the sixty days had expired. We think they naturally might infer from the defendant's conduct that the claim was to be considered and determined upon its merits, and that there was no intention to set up a formal or techincal defense, founded on the time or manner of presenting the claim."

In *Western Union Teleg. Co.* vs. *Heathcoat*, 149 Ala.

423, 43 So. 117, the Court, on this point, on page 120 said:

> "While the defendant was entitled to have the claim for damages presented in writing within 60 days after the message was delivered for transmission, we think there is no doubt that the right is a limitation for the benefit of the defendant, is of its own creation, and may be waived by it, and the waiver may rest in parol. 27 Am. & Eng. Ency. Law (2d Ed.), p. 1049; Hill vs. Western Union Tel. Co., 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166; 1 Elliott on Ev. 596."

The Court also held that the local agent in charge of the Company's office at Birmingham had authority to waive presentation of a formal claim in writing, although this agent testified that he had no authority to waive any rules or regulations on the back of the blanks. The Court held, however, that he was a general agent authorized to transact generally the telegraphic business at Birmingham, and that there was no evidence tending to show that plaintiff knew of any limitations imposed by the Company upon his authority and that the Company would be bound by his acts in that respect.

In the case of *Hill* vs. *Western Union Teleg. Co.*, 85 Ga. 425, 11 S. E. 874, the Court held that in ordinary cases the provision relating to the presentation of the claim in writing within 60 days is reasonable and valid, and also held:

"The agent or manager of the company on duty at the station from which the message is sent is a proper person upon whom to make demand for the damages claimed, and he is competent to recognize and act upon an oral demand and thus waive any writing. Such a waiver will result from his refusal to pay upon the sole ground that the company was not to blame."

In *Western Union Teleg. Co.* vs *Stratemeier*, 6 Ind. App. 125, 32 N. E. 871, the Court, on the question of waiver, on page 872, said:

"The condition in the contract requiring the claim for damages to be presented in writing within 60 days is reasonable and valid, and is a condition precedent to a right to recover; but like all other conditions, the breach of which may defeat substantial rights, it should be strictly construed, and is subject to be waived. That condition was evidently designed to furnish appellant with reliable information respecting the claim for damages, to enable it to investigate the subject while the facts were fresh and readily accessible; and it had the unquestioned right to insist upon the literal fulfillment of the condition before giving attention to the claim. Telegraph Co. vs. Trumbull, 1 Ind. App. 121, 27 N. E. Rep. 313. But it appears from the pleading under consideration that appellant acted upon an oral presentation of the claim, and

investigated the matter. Upon such presentation, it entered into a correspondence with appellee concerning the claim, and offered him money in settlement of his damages; thus recognizing a liability without demanding of him the performance of the condition. Having entered upon the investigation of the claim upon appellee's oral complaint, he might well have presumed appellant would ask him for further and more accurate information, if it had been desired."

In *Hays & Bros.* vs. *Western Union Teleg. Co.*, 70 S. C. 16, 48 S. E. 608, the Court held:

"Where a blank used in sending telegrams provides that a claim for damages must be made in writing within 60 days, a waiver of the condition may be shown by acts of the company's agent in accepting verbal statements as to damage, and seeking information of plaintiffs as to the merits of their claim, within the time limited by the blank."

In *Western Union Teleg. Co.* vs. *Fitts*, 13 Ga. App. 248, 79 S. E. 156, the Court held:

"The evidence was sufficient to show a waiver of the condition of the contract printed upon the telegraph blank, which requires the claim for damages to be presented in writing. The testimony that the telegraph company received an oral de-

mand, and within a week after the message was sent, acted upon it and investigated the claim, is undisputed.

"And though the agent is not bound to recognize an oral demand, if he does so, making no objection upon the ground that it is not in writing, a waiver of the written demand will result."

The Court further held that after this waiver:

"The company was not restored to its original right to insist upon a written claim for damages merely because, after the expiration of the 60 days, the sender's attorney transmitted to the telegraph company a claim in writing in which the damages were specifically set forth and enumerated."

In the case of *Insurance Co.* vs. *Norton*, 96 U. S. 234, this Court held:

"An insurance company may waive any condition of a policy inserted therein for its benefit.

"As the company may at any time at its option give authority to its agents to make agreements or to waive forfeiture, it is not bound to act upon the declaration in its policy that they have no such authority."

"Whether it has or has not exercised that option is a fact provable by either written evidence or by parol."

In the case of *Insurance Co.* vs. *Eggleston*, 96 U. S. 572, 577, the Court said:

> "We have recently, in the case of Insurance Co. vs. Norton (supra, p. 234), shown that forfeitures are not favored in the law, and that Courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so on which the party has relied and acted. Any agreement, declaration or course of action on the part of an insurance company which leads the party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract."

The same ruling was followed in

*Hartford Life Insurance Co.* vs. *Unsell*, 144 U. S. 439,

and by the Circuit Court of Appeals of the Fifth Circuit in

*Talbot* vs. *Metropolitan Life Insurance Co.*, 142 Fed. 694.

*McCullough* vs. *Home Ins. Co.*, 155 Cal. 659; 102 Pac. 914.

*Fireman's Fund Ins. Co.* vs. *Norwood* (C. C. A. 8th Cir.), 69 Fed. 71.

This clause should receive the same strict construction against petitioner accorded by this Court to bills of lading, because it is of the Company's creation, and nothing should be added to it by implication. Also because it involves a forfeiture of respondent's rights.

Consequently it should not be construed to embrace a provision that notice must be given within sixty days after the person filing the telegram or for whose benefit it is filed, first learns of the failure. If such a clause had been contained in the stipulation, it might reasonably be contended that the Company, in the interest of uniformity, had no right to waive it.

Here, however, there is no such clause, hence the rule cannot apply, and there is no room for construction of language which does not exist.

## THE SHOWING THAT IF THE MESSAGE HAD BEEN TRANSMITTED AND RECEIVED BY RESPONDENT, HE WOULD HAVE BEEN PAID $4500 FOR HIS STOCK, IS SUFFICIENT TO SUSTAIN THE JUDGMENT FOR DAMAGES IN THAT SUM.

The cases cited and quoted from on pages 51 et. seq. of petitioner's brief are wholly different in principle from the instant case. They involved the question of remote, speculative or contingent profits, which might have been made either by the sender or sendee of the

message, if it had either been delivered in time and before change in the market, or if its verbiage had not been changed.

Thus in *Hall* vs. *Western Union*, 59 Fla. 275, Hall was a broker engaged in buying and selling to commission houses fruits, vegetables and produce. He sent, through defendant, several telegrams to different commission houses offering to sell them certain produce at certain prices "if quick". He had not yet purchased these commodities, but his purchase of them in the market was contingent upon the sales to the commission houses. He prepaid the telegram but through negligence the defendant telegraph company sent them all collect. By reason of this fact the commission houses refused to answer the telegrams or do any further business with Hall. Hall claimed damages, contending that if the messages had been sent as paid messages the commission houses would have accepted the offer and he would have bought the produce and resold it to them at a reasonable profit. He also claimed damages to his reputation and for loss of time in waiting for replies which never came.

The Court, at page 642 of 27 L. R. A. (N. S.) said:

> "It may be conceded that, if damage proximately resulted to the plaintiff from the defendant's act in sending the messages collect when they had been prepaid, a recovery may be had as in another delict."

"* * * yet it cannot be said that the improper transmission of the messages proximately caused the special losses alleged, since the messages were merely offers to sell property that had not been purchased, but by the purchase and sale of which the plaintiff expected to make a reasonable profit if the offers were accepted.

"The offers were not accepted, and it does not appear that it can be proven with any degree of certainty that the failure to accept was caused by the fact that the messages were sent collect. If the messages relate to important business transactions, and the addressees desired to accept the offers made, it does not seem reasonable that the offers were not accepted merely because the messages were not sent prepaid."

The *Richmond Hosiery Mills Case* decided by the Supreme Court of Georgia and also reported in 51 S. E. 290, was an action for damages for loss sustained by a rise in the market price of yarns because of a mistake in the verbiage of a message where December was substituted for October delivery. It was also for damages for loss of trade and because the plaintiff factory by reason of losing the chance to purchase the yarn for October delivery had to curtail its production and discharge a large number of hands.

Lumpkin, Justice, in delivering the opinion, held that such damages were too remote and speculative. He also said:

"While there is some conflict in the authorities, the more satisfactory line holds that 'compensatory damages cannot be recovered of a telegraph company for failure to send or deliver a mere proposal to sell * * * as they are contingent upon its acceptance'."

The Court cites all of the following cases cited in petitioner's brief on this point, except the Kiley case in 39 Hun, in support of this proposition.

In the *Beatty Lumber Company Case*, this company, plaintiff in the action, delivered a telegram for transmission in answer to one received, the message reading:

"Can deliver the four-sixteen stringers at Buffalo in 30 days for twenty-one sixty per 1000 feet. Commence shipping in five days."

The defendant negligently omitted to transmit or deliver the message. After holding that the conditions on the blank did not excuse the gross negligence shown, the Court considers the question of damages and first announces the rule relating to compensatory damages as in the Georgia case.

The Court further held that the proper measure of damages was not the difference between the cost of the lumber delivered at the point of delivery and the fixed price, but the difference between such price and its market value at the time when delivery would have been made if the contract had been consummated. In

that case the damage was nothing, because lumber continued to go up after the message was delivered to the defendant and the Court said plaintiff was actually better off because of the failure to transmit, because it is to be presumed that it could have sold the lumber on the market for a higher price.

The case of *Western Union Teleg. Co.* vs. *Hall*, 124 U. S. 444, also cited by petitioner, clearly shows the distinction.

The message was: "Buy ten thousand if you think it safe. Wire me." It referred to 10,000 barrels of petroleum. Had it been delivered on time the purchase would have been made at $1.17 per barrel. On the date of the delayed delivery of the message the price had risen to $1.35 and no purchase was made. Plaintiff was buying on speculation, but there was no evidence whether he would have resold it on the following day or at what time or how long he would have waited on the rising market. The Court held that plaintiff could only recover nominal damages, because the only theory upon which plaintiff could show actual loss was on the supposition that, if he had bought on the 9th of November he might and would have sold on the 10th. That in point of fact, plaintiff had suffered no loss through defendant's acts because no transaction was in fact made and the loss claimed was purely contingent. This suffices to show the principles announced in the cases cited.

The damages involved in the instant case do not

involve remote, speculative or contingent profits, or any loss of profits at all. If Miller were suing the telegraph company claiming that, if he had purchased the stock at $90.00 per share he might have resold it at a higher price, or for damages because by failing to get respondent's stock the merger of the bank fell through, whereby he was damaged, the cases cited might be applicable.

Here, however, the message, irrespective of the manner in which it was worded, was sent, to carry out a sale of this stock to Miller, which had practically been consummated except as to the delivery of the Czizek and Jones stock, prior to the departure of Czizek for California. The following language of the Circuit Court of Appeals (Tr. 172) is fully sustained by the evidence.

> "The meaning and import of the message were perfectly plain on the face of the paper; hence, cases where cipher messages were involved are not controlling. Czizek's testimony is positive, and the circumstances sustain it, that he would have sold the stock at the price offered in the message that was not transmitted and the evidence is that he would have been paid the price offered; but a few days afterward, because of the failure of the bank, the stock became practically worthless. Under the facts, the difference between what he was offered and would have accepted and the value of the stock at about the time he called

> upon the manager at Boise is the measure of the damage. U. S. Teleg. Co. vs. Wenger, 55 Penn. St. 262; Harron vs. W. U. Teleg. Co. (Iowa), 57 N. W. 696."

It is apparent that in practically every action for damages, where injury is caused by delays, mistakes in verbiage, or non-transmission on the part of the telegraph company, the very nature of the message presupposes that some act would have been performed by the sendee, or by some third person, as otherwse the negligence of the telegraph company would not cause any injury.

In an extended note to *Western Union Teleg. Co.* vs. *Caldwell*, 126 Ky. 42, 102 S. W. 840, beginning on page 748 of 12 L. R. A. (N. S.), the author refers to a long line of cases from the different state and Federal Courts which

> "sustained judgments against telegraph companies for failure promptly to transmit and deliver telegrams, although any benefit to be received from the telegram, if properly transmitted and delivered, was dependent upon the contingency of some possible action on the part of the sendee or some third person."

In the principal case the Kentucky Court of Appeals, in permitting a recovery for failure to deliver a message informing sendee of the death of her brother, distin-

guished the case of *Smith* vs. *Western Union Teleg. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126, relied upon in petitioner's brief in the case at bar, and points out that in that case Smith, who was speculating upon the New York stock market, failed to receive a telegram relating to his stock transactions, and claimed that if the telegram had been delivered in due time he would have kept his margin good and saved himself from the loss of several thousand dollars, which he sought to recover from the company. In the Caldwell case, the Court, continuing on page 751 of 12 L. R. A., says:

> "In affirming the judgment awarding Smith nominal damages the Court rested its conclusions upon the ground that the damages sought to be recovered were too remote; that they did not flow naturally from the failure to deliver the telegram, and, in the ordinary course of events, could not have been expected to arise from its non-delivery; and that the injury complained of was not contemplated by the parties at the time the contract for the transmission of the message was entered into, nor did the contents of the message inform the company of the probable action Smith would take upon its receipt."

The Court then distinguishes the cases and points out that the testimony of the sendee that she would have wired to have the funeral postponed until she could get there and the testimony of relatives that

her wishes would have been respected were uncontradicted and supported by the ordinary rules of human experience when judged by the standards that regulate the conduct of people generally. The Court in answering the same contention made here, said:

> "It is true, intervening steps must have been taken, and independent causes set in motion. But there is no reasonable doubt concerning what she and the family of the deceased would have done, had the message been delivered. The appellant undertook to transmit and deliver to the addressee without unreasonable delay this message, and should be held liable for the consequences of its negligence that in the usual course of events and according to human experience were likely to ensue, and which, from the nature of the message, might have been anticipated with reasonable certainty."

This language, we submit, applies with equal force to the present case.

The other circumstances, in addition to respondent's testimony that if he had received the message he would have immediately wired his acceptance, referred to by the Court of Appeals, are that respondent was familiar with the condition of the Idaho National Bank. He declined to enter the merger which Miller was negotiating. He had previously had bad experience with bank stock. He did not want to keep the stock any

longer but wished to sell it. He talked over the sale with Miller at Boise during the fall before the telegram was prepared, and before he, Czizek, went to California, but the sale was not then consummated because Miller was not ready at that time to purchase, but was going East to get the money and would be back at a certain time and would then buy the Jones and Czizek stock. Czizek, before his departure for California, appointed Jones as his agent to deal with Miller when he, Miller, returned, and Jones and Czizek were to sell together. Czizek informed Miller to that effect before leaving for California. Upon Miller's return to Boise with over $80,000 with which to buy stock of the bank, he went to Jones to obtain the Jones and Czizek stock, and the telegram in question was the result. This message, if transmitted and delivered, would have conveyed to Czizek the information that the sale of the Idaho National to the Pacific National had been made, subject to Miller obtaining two-thirds of the Idaho National stock, and that if Miller did not obtain the two-thirds there would be a delay of a year and chances of liquidation of the Idaho National Bank, and that if Miller did not get two-thirds of this stock liquidation would follow. That Miller was ready to pay $90.00 per share, and that Jones, who was on the ground and acting for Czizek, was inclined to accept the offer of $90.00 per share for his stock.

Not alone these facts, but the ordinary rules of business conduct support respondent's testimony that he

would have immediately wired his acceptance of the offer had he received the message.

Clearly the damages sustained were the direct and natural result of petitioner's default, and were such as, from the very nature of the message as disclosed on its face, might be the result of the failure in transmission.

With reference to petitioner's contention at the top of page 60 of its brief, that the telegram in suit was not even an offer but only an inquiry as to whether the respondent would sell, we will refer to the finding of the Trial Court on the first hearing (Tr. p. 154):

> "I further find that Miller desired and was able to buy the stock at $90.00 per share, and that the telegram is to be construed as advising plaintiff of an offer of $90.00, and, had it been delivered, such is the meaning it would have conveyed to him."

As already pointed out, this is the only conclusion that could be reached from the evidence.

For these reasons, and without further discussion of the cases cited by the petitioner, we respectfully submit that these cases are not authority here, and that this defense to the action should not prevail.

## THE DECISION OF THE CIRCUIT COURT OF APPEALS THAT ITS RULING ON THE FORMER HEARING UPON THE SAME STATE OF FACTS BECAME THE LAW OF THE CASE AND WAS CONTROLLING ON THE LAST APPEAL WAS CORRECT.

We submit that the reasoning of the Court of Appeals on this question (Tr. p. 144-46) is sound.

The case of *Messenger* vs. *Anderson*, 225 U. S. 436, relied upon, differs from the case now on argument, because it involved the construction of a will upon which title to land in Ohio was dependent, and the Supreme Court of Ohio, in an action between the same parties pending the proceedings in the Federal Court, construed the will differently from the construction placed thereon by the Federal Court. (Anderson vs. United Realty Company, 79 Ohio St. 23, S. C. 222 U. S. 164.) The question was whether on the second appeal the Circuit Court of Appeals was so far bound by its former decision as to preclude it from following the state decision in a matter of local law. This Court held that the rule as to law of the case expresses the practice of Courts generally to refuse to reopen what has been decided, not a limit to their power, and on page 445 said:

> "We should lean towards an agreement with the State Court, especially in a matter like this."

Like reasons do not apply to this case, nor do we

find that this Court has ever over-ruled the case of *Roberts* vs. *Cooper*, 20 How. 481, 15 L. Ed 969, which seems to have been followed ever since by the Federal and State Courts.

Since it is not a jurisdictional question, this Court may in these proceedings review the first decision, but we respectfully suggest that it might not wish to do so, at the instance of the petitioner, who had the opportunity to apply for a writ of certiorari within three months from the first decision, but did not do so, and, however desirable it may be for the questions involved in that decision to be finally set at rest by this Court, it may perhaps be considered equally important that the wholesome practice involved in the rule which puts an end to litigation be again recognized by this Court.

We respectfully submit that the judgment should be affirmed.

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